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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

WALTER A. WALKER, JR.

Petitioner

v.

CONSUMERS POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS SIXTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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November 1987

QUESTIONS PRESENTED

Whether the following constitute departure from the usual course of judicial proceedings so far as to call for an exercise of this Court's power of supervision:

1. The fabrication of false statements of facts of this case by the Appeals Court in addition to, lying through deliberate omissions of key facts and issues, and lying through innuendos and implications calculated to direct readers of the decision to wrong conclusions that are detrimental to the Petitioner only.

2. The cover-up of a trial judge's biased and prejudiced action in pre-trial, during trial, and in post-trial.

3. To base a decision to reverse a jury verdict on a reason that is obviously meritless, while setting forth in the

opinion, no case precedent and no legal theory in support.

And finally:

4. Whether the Appeals Court's refusal to address any of the issues, arguments, and facts that were set forth by Petitioner in his Appellee Brief is consistent with the Due Process Clause of the Fourteenth Amendment.

5. Whether the opinion supporting the Appeals Court's decision is valid under the Seventh Amendment in that it abrogates trial by jury.

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TABLE OF AUTHORITIES

Cases: NONE

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SIXTH CIRCUIT

AND REQUEST FOR SUMMARY REVERSAL

The petitioner, WALTER A. WALKER, JR., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Sixth Circuit rendered in these proceedings on July 27, 1987. A summary reversal of that judgment is also requested.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, Sixth Circuit, as yet unreported, appears at Appendix A.

JURISDICTION

The order of the U.S. Court of Appeals, Sixth Circuit, was entered on July 27, 1987. A petition for a rehearing en banc was denied on September 10, 1987. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VII:

"In Suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any court of the United States..."

Constitution of the United States, Amendment XIV, Section 1:

"...nor shall any state deprive any person of life, liberty, or property without due process of law..."

STATEMENT

The petitioner, Walter A. Walker, became employed with Respondent, Consumers Power Company on March 15, 1971, His initial title was Associate Engineer in the Nuclear Fuel Supply Department. The primary mission of the Nuclear Fuel Supply Department (NFSD) is to manage the multi-million dollar

nuclear fuel cycle. Petitioner was subsequently upgraded to the titles of General Engineer and later, Senior Engineer.

Respondent refused to promote Petitioner seven times is five years to key positions that were open and to which he alleged that he was clearly the most qualified by a wide margin. After the sixth incidence of Respondent's refusal to promote, Petitioner sought and received an audience with the man who was the President, Chairman of the Board, Chief Operating Officer and Chief Executive Officer (CEO) of the company. During that discussion, Petitioner left documents and a written condensed version of the allegations of wrongdoing that was subsequently presented in trial.

Per the CEO's orders a half hour later, Petitioner repeated the same

presentation to the VP personnel. After a one month investigation, the VP Personnel submitted his report. In the CEO's office, Petitioner received a written rejection of his charges and the request to overturn the promotion decision. On March 19, 1980, he was fired by Respondent.

The five count complaint was filed on August 12, 1980. Petitioner charged Respondent with violation of the Civil Rights Act of 1866, U.S.C. 42, section 1981; Breach of Contract; Fraudulent Misrepresentation; Tortious Injury to Reputation; and libel and slander. Petitioner subsequently dropped Count 5. Respondent submitted 12 motions for Summary Judgment and 2 motions for dismissal. As a result of a hearing on those matters, Count 4 of the complaint was dismissed.

After discharging his original set of three lawyers for inactivity on January 29, 1981, and their replacement attorney for inadequate preparation on February 5, 1982, Petitioner was unable to obtain counsel competent or willing to take his case. He was forced to prosecute his cause of action while acting as his own attorney.

Ultimately, the trial began on May 7, 1984, presided over by Judge Charles Joiner, to whom Petitioner had charged, in a 29 page request for his recusal, to be implacably biased and prejudiced against the Petitioner and for the Respondent. When the trial judge refused to disqualify himself, Petitioner sought a Writ of Mandamus in the Sixth Circuit Court of Appeals. The Appeals Court refused to consider the writ.

Count 3 was dismissed via directed verdict. On June 6, 1984 the seven member jury announced its verdict: No on the charge of violation of U.S.C. 42, Section 1981, and Yes on Breach of Contract. The jury awarded Petitioner $1,194,600. The verdict was a unanimous decision. The trial judge upheld the jury's verdict in a Judgment Notwithstanding the Verdict (JNOV) hearing on August 7, 1984.

Respondent appealed on September 10, 1984. On July 27, 1987, after three years of appeals, including a 1 1/3 years after the Oral Argument, the Appeals Court made its decision in a 13 page opinion. It decided to vacate the jury decision and remand the case back to the assertively biased and prejudiced judge. It further directed that the retrial be held minus counts 1 and 3, and that the

issue of promotions be withheld from the jury.

REASONS FOR GRANTING THE PETITION

THE APPEALS COURT'S DESCRIPTION OF THE CASE IS PURE FICTION

The Appeals Court took an unusual approach to evaluating the merits of this appeal. It said at page 4 of the opinion, that all three members of the panel had made "a careful review of the entire record, which included a thorough reading of the transcript..." This is an incredible statement. It says that each of the three members of the panel made a "thorough" study of 1706 pages of transcript. It must be understood that there was only one copy of the transcript to share between the three of them.

The Appeals Court claims that it made a "careful" review of 3141 pages of the record, of which only one copy was available to the Court. That number of

pages do not include the 513 items of evidentiary documents that were established for use by Petitioner.

The most immediate question regarding The Appeals Court's ambitious undertaking to review the entire record is WHY! The Appeals Court set forth no reason why it felt compelled to take the unusual step of reviewing the entire record "carefully," as well as making a "thorough study" of the transcript. A comparison of the opinion to the facts contained in the transcript reveal a document rife with false innuendos, untrue statements and outrageous omissions.

Mr. Heiks name is Ronald Heiks, and not Donald Heiks. Petitioner's counsel did not withdraw. As clearly stated in the Appellee Brief at pp 7-8, his first set of three lawyers were discharged on

January 29, 1981. Their replacement attorney was discharged on February 5, 1982, which was more than two years and three months before the trial.

The Opinion at page 2, paragraph 1 makes the following false statement:

> alleged violation of 42 U.S.C. Section 1981 by depriving him of the full and equal benefit of all laws and proceedings as enjoyed by white citizens.

Petitioner charged that he was an executive-without-portfolio. That the company willfully refused to promote him to positions that were open, and for which he was the most qualified by a wide margin, seven times in five years. Petitioner charged that said qualifications were based on comparisons of education, contacts, experience, demonstrated competence and contributions. Petitioner charged that hundreds of millions of dollars were lost by the company's

refusal to place him into said key managerial positions. He charged that the sole motivation for said acts of wrongdoing was racial animus.

The Appeals Court said that Petitioner's position of representing himself posed difficulty for him and the trial court. There exists no evidence in the transcript of said difficulty to Petitioner. There also exists no evidence of said difficulty to the trial court. The record, including the transcript of the trial judge's comments at the Judgment Notwithstanding the Verdict Hearing contains no statement from the trial judge complaining of a difficulty to the trial court. The Appeals Court's statement is unsupported.

Footnote 2 at page 5 of the Appeals Court's Opinion, states the following:

> However, in response to a direct question from the

> defense, Walker admitted that there was nothing specifically said about promotions, contributions, or advancements. Cross-examination of Walker at pp. 29-30, May 29, 1984.

An examination of that portion of the cross-examination which actually begins on page 26 reveals that Walker's actual admission was merely in response to what was contained in his statement given in his interrogatories, and that it was <u>not</u> a general admission as clearly stated by the Appeals Court.

The Appeals Court's quotations of the Atwater discussion did not include all of the portions quoted by Appellant and Appellee in their briefs. In fact, the Appeals Court, on its own, set forth portions that were not quoted by either party. Petitioner, in his Appellee Brief, clearly destroyed Appellant's contentions, but the Appeals Court ignored his argument.

The Appeals Court stated at page 6 of its opinion:

> Defense Counsel went to great lengths to show that in 1973 Walker should have been aware that he no longer had any right to expect promotions even is such a right had previously existed.

The transcript shows that 4 of 79 pages of cross-examination pages were devoted to this issue. This is clearly not "great lengths."

The Appeals Court stated in its Opinion at page 9, that Mr. Atwater "testified." With the language precision required of members of the bar it obviously means that Mr. Atwater was placed on the stand at the trial before the jury where it could carefully observe his demeanor. The fact is that a deposition was taken from Mr. Atwater in the comforts of a suite at the Marriott Hotel at Detroit Metropolitan Airport on Satur-

day June 2, 1984. His deposition was read in court on Monday, June 4, 1984. Walker called seven executives of Defendant Company to the stand as adverse witnesses.

Page 9, paragraph 3 of the Opinion stated:

> Not only did Walker clearly relate the conversation upon which he based his claim, but also Consumers Power did not even question Donald Heiks about that conversation although Heiks appeared as a witness.

The facts are that Mr. Heiks was put on the stand by the Petitioner as an adverse witness. After Petitioner finished Mr. Heiks, Counsel for Respondent declined to question Mr. Heiks.

Page 3, paragraph 1 of the Opinion was completely incorrect. It said that Petitioner claimed "that Consumers Power thus breached its contract by terminating

him." It should have said "...by terminating him without cause."

The entire first paragraph, of Page 2 Section I is completely false. The facts (Walker testimony pp 47-67, May 8, 1984) are that Walker met his future wife at Iowa State University when both were attending graduate school. Walker was in the graduate school of Aerospace Engineering, and his future wife was in the graduate school of Nuclear Engineering. In November 1969, Walker began his employ as an Aerospace Engineer at Rockwell International Corporation in Columbus, Ohio. After receiving her masters degree in Nuclear Engineering, Mrs. Walker, became employed as a Nuclear Engineer at Consumers Power Company in Jackson, Michigan, in June 1970.

In August 1970, Mrs. Walker's department had a picnic which was atten-

ded by Walker. There he met Ronald Heiks, Gerald Walke and Robert Haueter. None of these people were officials of the company at that time. In September 1970, Walker and his future wife became engaged. Mr. Walke, who was Mrs. Walker's supervisor at the time, initiated a campaign to get Walker employed at Respondent company. In early December 1970, Walker attended the future Mrs. Walker's department Christmas party. There he met Mr. Robert Atwater who then held the title of Director, Nuclear Fuel Supply Department.

On December 18, 1970, Walker spent the day at Consumers Power Company on an employment interview with various departments. During the course of that employment interview, discussions were held in the office of Mr. Robert Atwater, General Director of Fuel Supply with Mr. Ronald

Heiks, Director of Nuclear Fuel Supply Department, attending. The oral contract was made at that time. Mr. Heiks became Petitioner's boss. Mr. Heiks reported to Mr. Atwater. Thus Mr. Atwater's relationship to Petitioner was a business relationship with a subordinate, and not a casual, one time, social encounter as implied by the Appeals Court's opinion. Opinion pp 9-10.

All of the above was stated in the trial, and is contained in the transcript. Walker did not marry his wife in Columbus, Ohio. He married her in East St. Louis, Illinois. He did did not marry her before she became employed with Consumers Power company. When he met her at Iowa State University, both of them were graduate students. She did not receive a degree in nuclear engineering. She received a Masters degree in Nuclear

Engineering, and not a (BS) degree in Nuclear Engineering. The two social activities with Consumers Power Company employees occurred before the marriage. At the first social activity, Walker was a friend of his future wife, and there were no company officials attending at the time. At the second social activity, which was in the Winter, and not before the fall, Walker's future wife was his fiance.

Walker did not "develop contacts with certain officials of Consumers Power Company after attending a number of company social activities with his wife." The oral contract was not made at a social activity in the midst of alcohol and frivolity "Ultimately in the Fall of 1970..." It was made in Mr. Atwater's office during Walker's employment interview on December 18, 1970 (Winter).

The Appeals Court, in its opinion at Page 3, paragraph 1 said that:

> Plainly most of this evidence was advanced in support of the second part of Walker's claim that he was unjustly treated not only because of his race but, even more importantly, because of management's failure to recognize and reward adequately his managerial and engineering talents.

From the Brief, and the Law Memorandum, the petitioner's opening statement and summation, it is clear that this case was primarily a discrimination case. The evidence was consistently advanced to establish the contributions of Petitioner not in support of the Breach of Contract claim, but in support of the Fraudulent Misrepresentation claim.

Petitioner contends that "even more importantly" is an editorial comment that clearly indicates a bias and prejudice against a clear and convincing case of corporate executive jim crow. There

exists no evidence to support that statement.

The statement "...failure to recognize and reward adequately..." is ridiculous. Walker claimed that he was denied promotions to key positions that were open, and to which he was clearly the most qualified by a wide margin. Walker claimed that said denial impacted the corporate financial position in a direct and negative manner. All of the reasons for the submission of the evidence was stated by Petitioner on the stand.

The Appeals Court, in its opinion at page 3, stated that:

> The great bulk of Walker's testimony and other proof went to the quality of his job performance and the nature of his relationships with other personnel with whom he worked or to whom he was responsible.

This is an enormous falsehood. The transcript makes it clear that that the great bulk of his testimony and proofs went to his contributions, demonstrated competence, qualifications, experience, impact on the corporation's "bottom line," direct working relationship with middle and top management of the company, his claim that he was an executive, and his close and effective contacts with key personnel in the Nuclear Fuel Cycle Industry. There exists nothing in the transcript to lead anyone with modest reader comprehension skills to come to the conclusion that was set forth by the Appeals Court.

The Appeals Court set forth some alleged conflict between Walker's testimony as a witness under oath and as an advocate. (Opinion page 5 and 9). The record contains no complaint or observa-

tion of said conflict. Respondent after more that two years of study and reflection, plus the use of enormous resources, made no such complaint in their brief or during the Oral Arguments. The trial judge made no complaint of this sort either during the trial proceedings or during the Judgment Notwithstanding the Verdict Hearings.

There is a substantial discussion on mitigation of damages which was not an issue in this appeal. This was not an issue in this appeal.

The Appeals Court on page 11 said:

> Although there may have been some confusion between the elements of a successful 1981 claim and the breach of contract claim, that confusion will be avoided since we remand only on the breach of contract claim under Toussaint.

Respondent did not make a claim in its briefs that there existed some sort of confusion between the 1981 claim and

the breach of contract claim. The trial judge indicated no confusion of that sort.

It must be noted that no mention is made of Petitioner's performance during the entire opinion. The Appeals Court sets forth nothing to indicate that Walker may have been fired for cause. Thus the Appeals Court not only agrees with Petitioner that the claim of breach of an oral contract to fire only for just cause was properly submitted to the jury, but that Petitioner met the burden of proof of his claim.

The opinion at page 5 states that Petitioner "interjected freely during the course of trial" some sort of "unsworn additional assertions." The transcript does not contain a rash of statements of any kind that were "interjected freely." That statement implies that Petitioner

was, at times, out of control in comparison to the Counsel for Respondent. Petitioner's conduct at all times during the trial was competent and professional. This self control was remarkable since it was maintained in the face of numerous reversible errors and occasional hostile actions by the trial judge.

Examples of blatant omissions are set forth below. The Appeals Court refused to note:

1. The seven failures to promote in five years. Such notation should include some facts that demonstrate that Petitioner was more qualified by a huge margin.

2. The direct discussions with John Selby, President, Chairman, CEO and COO of the company, and Jack Reynolds, VP of Personal in 1978, in which the basis of the case was set forth to them both

orally and in writing. As pointed out in the Law Memorandum, this was the centerpiece of the lawsuit.

3. The charge that John Selby and Russell C. Youngdahl, Executive VP were the persons directly responsible for the acts of wrongdoing.

4. Petitioner's claim that he was an executive without the title, pay and formal responsibilities commensurate with that position. That his qualifications and demonstrated competence were unique to the company and the industry. Furthermore, that he was more qualified to be Executive Vice President than the person holding the position at the time of the trial by a wide margin.

5. The fact that Petitioner made an effort to disqualify Judge Joiner for implacable bias and prejudice against the Petitioner.

6. Petitioner in his Appellee brief charged the trial judge with 24 reversible errors.

7. It was not mentioned That Petitioner utilized 136 items of evidentiary documents. That Respondent utilized only 2. That Petitioner utilized 8 demonstrative exhibits. Respondent utilized none.

8. That Petitioner put 7 Consumers Power executives on the stand as adverse witnesses. Respondent only took the deposition of one witness that was read in court.

9. The number of contradictions resulting from Petitioner's examination of the eight witnesses.

10. The number of arguments of law.

11. The number and intensity of the Defendant's voir dire examinations of Petitioner.

12. The fact that Petitioner as attorney pro se was involved in all of the phases of the appeal. The Opinion should read:

Submitted: November 8, 1985

Argued: March 7, 1986

Decided: July 27, 1987

and:

Walter A. Walker, Pro Se for Plaintiff-Appellee.

George M. Brookover, and John Collins on Brief, Foster, Swift, Collins, and Coey for Defendant-Appellant.

13. The name of the trial judge.

14. A discussion on compensation for loss of dignity, humiliation and mortification. There was no statement regarding the fact that Petitioner sought

$5 million, for breach of contract, $5 million dollars for fraudulent misrepresentation, and $15 million dollars in punitive damages. The implication is that the amount awarded was considerably higher than requested.

15. The fact that in this decade of malicious attack on equal opportunity, affirmative action, quotas, and minority set asides, not a single word was devoted to A COMPARISON OF DEMONSTRATED COMPETENCE AND QUALIFICATIONS. Nothing was said about the fact that Petitioner's whole case was directly focused on those matters.

The Appeals Court's description of Petitioner clearly implies that his skills are limited to that of a con artist or at least a sycophant that managed to beguile some gullible corpoate officials into making promises that

they would eventually regret. The Appeals Court implies that Petitioner was fired without cause. It does not explain how an expert sycophant managed to reach such a measure of disfavor with the company's officials that they would feel compelled to fire him without cause.

Said con artist skills are described charitably as "unusually high interpersonal skills." Note that Respondent consistently maintained that Petitioner was passed over for promotion seven times in five years because he consistently lacked said interpersonal skills.

The Appeals Court did not set forth anything to explain how Petitioner could win a 12 day multi-million dollar employment lawsuit, and win a jury award of $1.2 million without COMMUNICATION SKILLS. It was determined by the VP - Personnel, after a one month investi-

gation, that he was consistently not promoted because he lacked said skills.

The Appeals Court did not explain how Petitioner managed to successfully pursue, over a four year period, a multi-million dollar lawsuit, on his own without the demonstrated traits of initiative. The VP-Personnel, after his investigation, and Respondent consistently asserted, in trial, that Petitioner lacked initiative.

The point is that this is a cover-up. The "mistakes" made by three distinguished judges of the Sixth Federal Circuit Court of Appeals, all of whom were former Federal District Court judges, after a careful review of the entire record including a thorough reading of the transcript is unconscionable. The decision itself must be

considered to have been made in an atmosphere of hostility to the Petitioner.

THE DECISION TURNED ON A BLATANT LIE

The most outrageous and damaging falsehood contained in the opinion is the statement that it was the Petitioner's claim that he would receive promotions and salary increases commensurate with his performance. The decision turned on this statement and it is totally false. This was not Petitioner's claim. This was only one of the trial judge's 82 instructions to the jury. Petitioner's true claim was as follows:

> He was promised titles, remuneration and formal responsibilities commensurate with his corporate and departmental contributions comparable to other high contributing employees.

The record is very clear on this matter. Beginning with Plaintiff's Deposition (Sept. 1981) through

Plaintiff's Law Memorandum (July 1982), Draft Pre-Trial Statement, Plaintiff's Request for Instructions to the Jury (August 1982 to May 1984), and Plaintiff's Addendum to Request for Recusal (May 1984), Petitioner consistently set forth that claim. During trial, Petitioner stated that claim on three occasions during his testimony. (Walker Testimony pp 73-74, May 14, 1984; pp 61-63, May 8, 1984; pp 27-35, May 30, 1984.) During his examination of Mr. Heiks (p 71, June 6, 1984), Petitioner again set forth that claim.

On May 8, 1984, only minutes before the commencement of the trial, a hearing was held to resolve some final pretrial motions. During that hearing, the matter of Petitioner's oral contract claim and the evidentiary requirements to establish

that claim, as a matter of law, was discussed and argued in detail. (Hearing, pp 11-13,16,20-21,31, May 8, 1984.)

During Petitioner's testimony, on May 9, 1984, another discussion, with the jury excused, was held regarding Petitioner's claim. The aforementioned claim and the evidentiary requirements were confirmed and reinforced (Walker Testimony, pp 44-47, May 9, 1984). Finally, Counsel for the Respondent acknowledged Petitioner's claim during his summation. (Summation of Collins at p 41, June 5, 1984.)

As stated on page 4 of Appellee's Brief, the purpose of a large portion of Petitioner's testimony was to submit evidence of his qualifications, demonstrated competence, and contributions to the department and the company. That was clearly set forth to the jury. (Walker

Testimony, p 126, May 11, 1984.) That purpose was stated numerous times during the trial. (See Walker Testimony, pp 48-50 May 9, 1984, and May 11, 1984.) Before the trial went to the jury, Walker's claim was stated again. (See Directed Verdict Arguments, June 1, 1984, pp 134-135.) During Petitioner's summation, he again set forth the aforementioned true oral contract claim. (See Walker Summation, June 5, 1984, pp 17-18.)

Petitioner submitted evidence to show that the company's policies supported the promises that had been given to him. He then detailed seven occasions that Respondent refused to promote him to positions that were open and to which he was more qualified by an enormous margin by comparison of his qualifications, demonstrated competence

and contributions to all of the other candidates.

Petitioner's true claim was clearly understood by both parties and the trial judge, on the day that the trial began. The evidence is overwhelming that the entire trial dealt with Petitioner's true claim. No other variation of this claim was ever set forth from the point of the Petitioner's deposition in 1981, to the point where all of the procedures of the trial had been completed, and the trial judge began his instructions to the jury in June 1984.

It is well settled that the responsibility for making a claim lies with the Plaintiff who bears the burden of proof, and <u>not</u> the trial judge. Nevertheless, Judge Joiner instructed the jury that the Plaintiff's claim all the time was <u>not</u> that he had the aforementioned claim of

an oral contract, but that he had an oral contract for "certain", "specific" promotions and "certain", "specific" salary increases.

This opinion is pure fiction. It bears no resemblance to the actual trial or the issues in the appeal. The Appeals Court's decision is clearly invalid. If the facts that support the decision are wrong, then the decision must be deemed wrong.

THE JURY INSTRUCTION THAT WAS THE SOLE FOUNDATION FOR THE DECISION WAS PREJUDICIAL TO THE PLAINTIFF

The Appeals Court in its opinion, states that it is unable to determine whether or not the jury verdict was unaffected by Judge Joiner's instruction. There can be no other conclusion than that the affect was extremely prejudicial to the Petitioner. Petitioner made precisely that argument in his

Appellee Brief at pp 39-40, which was completely ignored in the Appeals Court's opinion.

As set forth by Petitioner in his Appellee Brief at page 43:

> Once again, the Court had presented a false statement of fact to the jury that was clearly contradictory to the facts that were set forth in trial by the plaintiff. It is well known how much influence the presiding judge can exert upon the jury. When he contradicts the plaintiff on the plaintiff's own claims, the plaintiff is confronted with a huge obstacle to the maintenance of his credibility with the jury.

The Appeals Court detailed the lack of sufficient evidence to support a contract for specific promotions and salary increases. That analysis led it to a conclusion that was to the detriment of the Petitioner. In fact, Petitioner introduced no evidence of specific or certain promotions and salary increases,

since this was not the claim. The Appeals Court's reasoning over this matter, however, provides insight to the reasoning that the jury would follow assuming the incorrect claim. The jury, after receiving instructions requiring a decision based only on a preponderance of evidence, would also see no evidence, follow the same reasoning and reach the same conclusion as the Appeals Court. Thus the introduction of an incorrect claim through the improper jury instruction had to be prejudicial to the Petitioner. It was impossible for it to be beneficial.

The Appeals Court's analysis of Petitioner's contributions statement is most illustrative. It said:

> Such statements indicate no more than what any employee may hope for if that employee remains with a company.

It is clear that Petitioner's claim that he would receive rewards commensurate with his contributions compared to other high contributors is considerably more credible than an alleged promise of certain promotions and salary increases, in general. The Appeals Court's comment on Petitioner's "statements" is in agreement with that logic. The trial judge, therefore, replaced Petitioner's claim with a fabricated one considerably more lacking in credibility.

Clearly, the jury instruction was prejudicial to the Petitioner. There exists no legal logic to support any other conclusion. Certainly, Petitioner could not have benefited from the trial judge's action. If the Petitioner had lost, the trial judge's action in submitting the jury instruction would have been clearly reversible error.

To punish the Petitioner by vacating a verdict in his favor because of a single act that was clearly prejudicial to his case, which act was certainly beyond the control of the Petitioner, at the end of a month long trial, by a trial judge that was consistently charged over a one year period to be biased and prejudiced against him, has absolutely no basis in law, and is clearly unconstitutional.

There exists no precedent that supports the contention that a jury instruction, that was prejudicial to the prevailing party, is a basis for reversal. There is no explanation how such action meets the requirement to view the evidence in the light most favorable to the prevailing party.

A SINGLE JURY INSTRUCTION WHOSE IMPACT CANNOT BE DETERMINED BY THE APPEALS COURT CANNOT OUTWEIGH THE ENORMOUS ADVANTAGES OF DEFENDANT

A million dollar employment jury verdict for a man who acted as his own attorney and is untrained in law is extremely rare. It is considered to be impossible, under any circumstances, because the esoteric nature of the language and procedures, and the severe disparity in experience and expertise between the pro se petitioner and an experienced lawyer, places the pro se petitioner at an enormous disadvantage. At the very minimum, it is expected that the pro se petitioner would prevail only if the disadvantages of his pro se status would be compensated by a weak defendant, and/or incompetent defense counsel, and/-or sympathetic jury, and/or a friendly and helpful trial judge.

The facts of this case are that DEFENDANT was a Fortune 500 corporation with an enormous in-house legal staff and

unlimited financial, influential and technical resources. The OPPOSING COUNSEL were the senior partner, and one of the top litigators, of one of the most prestigious law firms in the state of Michigan, plus a member of Defendant's in-house legal staff. The seven person JURY was all-white. The TRIAL JUDGE exhibited such enormous bias and prejudice against the Petitioner during pretrial that Petitioner submitted a 29 page request for his recusal, petitioned for a Writ of Mandamus when he refused, and submitted an Addendum to the Request for Recusal shortly before the commencement of trial. Petitioner listed 24 reversible errors during trial in his Appellee brief. The trial judge upheld the decision during a JNOV hearing.

Petitioner was restricted to a one hour summation. The one month in dura-

tion trial had an extraordinary two week recess in the middle. The trial judge allowed Counsel for Respondent's own privately financed court reporters to substitute for the official court reporter during Petitioner's testimony, and to receive daily transcripts from them without copies being made available to Petitioner.

Thus the severe disadvantage of a pro se status, in this case, was raised to an unthinkable level by a number of additional negative factors. Notwithstanding all of those incredible disadvantages, the seven person, all-white jury rendered a unanimous verdict in favor of Petitioner on the claim of Breach of an Oral Contract and awarded him the amount of $1,194,600.

It is the Court's opinion that the jury's verdict may have been affected by

a single improper jury instruction. It is self evident to any prudent person that an affect so nebulous that it cannot be determined did not compensate for the enormous advantages in the possession of Respondent. Of course this would not be made manifest to any reader of the opinion, because facts regarding the enormous advantages in the possession of respondent were deliberately omitted by the Appeals Court.

This is the sole basis for the Appeals Court's decision to vacate the verdict and remand for a new trial. This legal position is completely without merit, unsupported by legal logic or precedent, and arises out of a blatant lie.

THE APPEALS COURT UNCONSTITUTIONALLY ABROGATES THE JURY SYSTEM

Our system of jurisprudence is based solidly on the concept of the jury

system. That means that a plaintiff can request and receive a trial in which judgment of the facts is made by a six or twelve members of his peers. This group is usually composed of people who are laymen and are basically unfamiliar with the law. It is understood that aggregations such as these will not base their judgments on the subtle nuances of legal theory, but on a common sense application of the rules that are set forth to them by the trial judge.

The Appeals Court in making its decision said the following:

> ...distinguishing between the statements made by Mr. Walker to the Court and jury in his capacity as his own advocate and those statements made under oath in his capacity as a witness.
>
> ... it has been necessary ...to consider only the evidence that was under oath and thus properly before the jury. We must separate for evaluation the statements given under oath

> from the unsworn additional assertions made by Walker in his opening and closing statements and interjected freely during the course of trial.
>
> We conclude the uncontradicted testimony of Walker himself..." "Disregarding whether Walker's statements concerning such promises were under oath ..." Opinion pp 4-5.
>
> Although many of Walker's statements concerning the conversation with Heiks and Atwater are best characterized as argument rather than testimony and must be disregarded unless supported by testimony under oath...

In the above discussions, the Appeals Court brings a perspective to its decision not expected of laymen. It is not only extremely unlikely that the members of the jury will wrestle with the very subtle technical differences between what is or is not testimony under oath, but they will not have the convenience of a written transcript, and more than a year and eight months to review it.

The Appeals Court, in making its decision, removed the jury as trier of the facts, and substituted itself as the jury. This is a usurpation of the primacy of the jury, and it is clearly unconstitutional. A losing party in taking the simple act of making an appeal does not have the right to have the jury of legal laymen, whose decision it disagrees with, removed and replaced by an elite unit of legal experts. There may be many who disagree with it, but this concept was adopted over 200 years ago, and must not, in this year of the bicentennial of the constitution, be tampered with now.

Furthermore, the Appeals Court based its decision on the "uncontradicted" testimony of Walker. Opinion page 5, paragraph 2. This statement must lead to the conclusion that there <u>existed</u>

contradicting testimony by Petitioner. The point is that Respondent was represented by very competent, very skilled counsel. It is commonly understood in the legal community that contradictory testimony, in the hands of skilled counsel, can be an extremely powerful tool for use in destroying an opponent's case. If such "contradictory testimony" existed, then it must be concluded that distinguished counsel for Respondent utilized it to the maximum extent allowed to persuade the jury to find for them.

The Appeals Court, however, chose to weed out, on its own, the alleged "contradictory testimony" of Petitioner. It then made and sustained its own motions to disregard certain portions of his testimony. Counsel for defendant was composed of highly competent trial

lawyers. As set forth earlier, they had enormous advantages in their possession. They were opposed by a single pro se plaintiff who was untrained and inexperienced in law. Respondent did not need the protection of the Appeals Court from possible technical problems in this case. The protection given to the defendant in this case is clearly improper.

THE APPEALS COURT'S OWN REASONING SUPPORTS PETITIONER'S CONTENTIONS

It is a matter of common understanding that trial law before a jury is the greatest art form of law extant. The rare combination of character traits, education, and years necessary to create a crack trial lawyer is well documented. The capacity of a crack trial lawyer to influence the jury when he is given at least a modestly strong case is legend.

As was set forth above, the team of three highly competent trial lawyers representing Respondent possessed enormous advantages to be utilized in the defense of their client. Petitioner's only exposure to legal education was a military law class when he was an officer in the U.S. Army in 1966. He was without moral, legal, research, stenographic, clerical, paralegal or technical assistance.

After three years of appeals, including a year and four months after the Oral Arguments, now comes the Appeals Court and asserts that the unanimous, seven-member, all-white jury's verdict, which was supported by the assertively biased and prejudiced judge in a Judgment Notwithstanding the Verdict hearing, must be vacated because after a year and eight months of study, the Appeals Court

determined that Petitioner prevailed in trial despite presenting insufficient evidence to prove that he had an oral agreement for specific promotions.

It is obviously impossible that the jury could be convinced of Petitioner's charges sufficiently to come to a decision that went against the evidence under the above conditions? The possibility that Petitioner prevailed despite insufficient evidence exists only if, during two years of self study, he developed himself into such an extraordinary lawyer that in the first trial of his life, despite the obstacles of a hostile judge and an unfavorable forum, despite an insufficiency of evidence, despite the expertise of three highly competent trial lawyers, he could convince the jury of his charges.

Such an accomplishment is logically impossible for a 45 year old man of alleged mediocre ability to train himself to assume that level of trial skills within two years, and to effectively apply said skills in a major trial upon his first attempt. By the Appeals Court's own reasoning, the theory of insufficient evidence to support a claim of an oral contract relating to promotions is totally without merit. It is clear that Petitioner won because the jury observed that the claim that he had made throughout the month-in-duration trial was supported by overwhelming evidence. The jury simply ignored the trial judge's faulty instruction.

THE APPEALS COURT'S DECISION IS A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS.

Anyone reading the briefs of this case and comparing them to the Appeals

Court's Opinion cannot deny the fact that the Appeals Court's Opinion bears no resemblance to the actual case. Appellee's briefs properly charges 12 INCIDENTS of reversible errors, and 13 INCIDENTS of reversible errors in jury instructions, including 3 on the Section 1981 claim, 2 on the Breach of Contract claim, and 8 on general trial procedures. The brief charges that the trial judge made a total of 24 REVERSIBLE ERRORS IN TRIAl. None of these charges were even acknowledged in the Appeals Court's Opinion, and none were properly addressed by legal logic. The Appeals Court not only ignored Petitioners's charges of reversible errors, but made the following extraordinary statements:

> ...nor does this appeal reveal any errors in the ruling with respect to Counts 1 or 3, which would require us to disturb those results. (Opinion, page 2)

> In reviewing the jury instruction given, we conclude that no particular instruction constituted error. (Opinion, Page 11)

Count I was brushed off in the Opinion as though there was no substantive argument and no charges of reversible errors. The history of Petitioner's attempts to remove Judge Joiner as trial judge in this case was discussed earlier. When the Appeals court refused to consider the writ, it held that such a request was applicable only during appeal. The Request was renewed during this appeal. Thus the Appeals Court, by its own rulings was compelled to review the Request for Recusal. The Appeals Court, in its opinion, ignored the recusal matter completely and sent the case back to Judge Joiner for retrial.

Obviously a trial before a biased and prejudiced judge is not a fair trial. The Appeals Court violated its own precedence. The refusal of the Appeals Court to take under consideration the charges that the trial judge was severely biased and prejudiced is grossly unconstitutional. This a clear signal to Judge Joiner that he and other federal district court judges of like mind have the higher court's approval to take <u>any means necessary</u> to subvert justice and force a verdict in respondent's favor.

All of the evidence strongly suggests that Petitioner's Appellee Brief and <u>all</u> of his arguments were ignored by the Appeals Court. Petitioner was not allowed to participate in the appeal of this case. This is a gross and obscene violation of Petitioner's due process rights.

THE APPEALS COURT'S RETRIAL RESTRICTIONS IS CLEAR AND CONVINCING EVIDENCE OF ITS MALICE TOWARD PETITIONER.

To compound the injustice of the Appeals Court's decision, it ordered a retrial before the original trial judge. Furthermore, that during the retrial, Petitioner will not be allowed to pursue any claims related to promotions. As clearly shown in this Petition, the only reason for the restriction was that in the initial trial, the trial judge substituted a fabricated, unfounded, irrelevant jury instruction describing Plaintiff's oral contract claims.

Respondent will receive the benefit of not having to defend itself against the charges of Count I, again. This is a tremendous gift since they only prevailed on that count through the benefit of 13 reversible errors and an attempt to sabotage the victory by the trial judge.

Furthermore, it will not be a retrial. It will be a new trial. The new cause of action will be the narrow claim of "unlawful discharge", as opposed to the original claims of discrimination, breach of contract in firing without cause, breach of contract in refusal to reward for contributions, and fraudulent misrepresentation. Clearly, the whole logic regarding evidentiary foundations, rules of evidence, trial procedures, arguments, direct testimony, and examination of witnesses will be different. This will be of tremendous advantage to the Respondent.

It is commonly understood that outrageous hostile actions taken against a black man are motivated by race. An overwhelming percentage of people of all races have a common reaction to a description of an obscenely hostile, and

unfair act by an agency and/or organization against an individual. When the story is completed, the listeners universally inquire if the victim is black.

A dilemma is created here by the Appeals Court's decision. As the story of outrageous harm unfolds before the jury, it is natural for the members to wonder why there are no charges of discrimination before them. The lack of said charges will severely reduce the credibility of the wrongful discharge claim, since it is human nature for them to conclude that if race is not the motivation for the acts of wrongdoing, then perhaps the acts themselves were not as harmful as they sound.

The Appeals Court, in remanding for a new trial on the narrow pendent claim of unlawful discharge, placed the petitioner in jurisdictional jeopardy.

It calls attention to the fact that a challenge could be made that the district court is obligated to dismiss the claim. The Appeals Court states that the "continuing jurisdiction under these circumstances to retry the pendent claim cannot, we believe, be seriously challenged." Of course they will be challenged, seriously or not. Plaintiff, will be forced to defend the Appeals Court's decision; which decision he is in total disagreement.

When the challenge reaches the appeals court, the three members of the panel will be forced to disqualify themselves. The whole disaster will have been forced upon the prevailing party of the trial simply because of the insertion of an improper jury instruction that was clearly detrimental to said prevailing

party by the trial judge. That this is a gross injustice is self evident.

The Appeals Court cannot exact what is essentially a post-trial summary judgment ruling, solely because of a trial judge's improper jury instruction. Therefore, it is instantly clear that the only step that was needed to correct the previous problem in a retrial was to order the trial judge not to issue the faulty jury instruction, and to issue the instruction requested by Petitioner.

THIS DECISION ESTABLISHES A PRECEDENT THAT ENABLES A BIASED AND PREJUDICED TRIAL JUDGE TO SABOTAGE ANY PLAINTIFF'S TRIAL VICTORY WITH IMPUNITY

When a trial is about to go to the jury for deliberation, and it is obvious to the judge and all parties that a verdict will be rendered for the Plaintiff, a biased and prejudiced, or incompetent trial judge, by the blessing of this

decision, will have the option of sabotaging the Plaintiff's verdict by the simple act of issuing a jury instruction contradictory and prejudicial to Plaintiff's claims.

Plaintiff's verdict will be destroyed. If the prejudicial jury instruction is unsuccessful in causing the jury to render an unfavorable verdict, all is not lost in the biased and prejudiced trial judge's campaign to stop the plaintiff. When the Defendant makes his appeal, the SIMPLE FACT THAT THE PREJUDICIAL INSTRUCTION EXISTED will guarantee automatic reversal by a court of appeals. This decision is a prescription for deliberate subversion of justice whenever it is the trial judge's whim.

****

It is self evident that all of the above which is severely harmful to the

Petitioner and enormously helpful to Respondent, after four years of pretrial and three years of appeals, cannot result from a single jury instruction by an assertively biased and prejudiced trial judge. If any merit could be found in such a ruling, it must be supported by some precedence and legal logic. Neither was set forth in this decision. The Appeals Court's departure from the accepted and usual course of judicial proceedings is extraordinary, probably unprecedented, and is marked by its particularly hostile nature. Its action calls for a vigorous exercise of this Court's power of supervision.

THE APPEALS COURT'S DECISION FITS A THREE YEAR PATTERN OF MALICE TOWARD PETITIONER

The Appeals Court's decision is not the first manifestation of their hostility to Petitioner. Previous to its deci-

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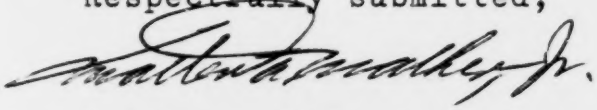
sion, the Appeals Court allowed the official court reporter to take one whole year to complete approximately 1/2 of the record of a 12 day trial. They generously allowed a multi-billion dollar Fortune 500 company to substitute a weak and inadequate escrow agreement for the standard supersedeas bond. Finally, they accepted the submission of a falsified transcript of the JNOV hearing.

CONCLUSION

The petition for a writ of certiorari should be granted. Summary reversal should be granted.

Respectfully submitted,



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November 1987

APPENDIX A

The opinion rendered by the United States Court of Appeals, Sixth Circuit.

— *RECOMMENDED FOR FULL TEXT PUBLICATION*
See, Sixth Circuit Rule 24

No. 84-1653

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WALTER A. WALKER, JR.,
Plaintiff-Appellee.

v.

CONSUMERS POWER COMPANY,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed July 27, 1987

Before: ENGEL, KENNEDY and MILBURN, Circuit Judges.

ENGEL, Circuit Judge. Consumers Power Company appeals a judgment entered on a jury verdict finding it liable for damages in the amount of $1,194,000 upon the complaint of plaintiff Walter A. Walker that he had been discharged from his job as a senior engineer in the Nuclear Fuel Supply Department. Walker alleged that he was discharged without just cause contrary to his contractual rights as recognized by the Michigan Supreme Court in *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich. 578, 292 N.W.2d 880 (1980). Although Walker had framed his original complaint on a number of different grounds, the parties finally proceeded to trial upon three separate counts. Count I charged

the defendant with having discriminated against plaintiff Walker on account of his race in alleged violation of 42 U.S.C. § 1981 by depriving him of the full and equal benefit of all laws and proceedings as enjoyed by white citizens. Counts 2 and 3 alleged pendent claims under Michigan law. Count 2 alleged that Consumers Power breached its employment contract with Walker, and Count 3 alleged a tort claim for fraudulent misrepresentation.

Prior to trial the court granted defendant's motion for a directed verdict on the claim for fraudulent misrepresentation, and at the close of trial the jury returned a verdict in favor of Consumers Power on the 1981 claim. No cross-appeal has been taken nor does this appeal reveal any errors in the rulings with respect to Counts 1 or 3, which would require us to disturb those results. We therefore confine ourselves to considering the propriety of the verdict and judgment on Count 2.

I.

Walker commenced employment with Consumers Power as an associate engineer in its Nuclear Fuel Supply Department on March 15, 1971. Walker had been previously employed in Columbus, Ohio as an aerospace engineer with Rockwell International Corporation, and he there married his wife. The two had met at Iowa State University where his wife obtained a degree in Nuclear Engineering. She thereafter obtained a job with Consumers Power. Walker developed contacts with certain officials at Consumers Power after attending a number of company social activities with his wife. Ultimately in the fall of 1970 conversations took place between Walker and Consumers Power officials, particularly Donald Heiks and Robert Atwater, which led to his accepting employment with Consumers Power.

The plaintiff's claim under Count 2 was twofold. He first alleged that part of his oral agreement upon entering into employment was that Consumers Power would not discharge

him except for just cause and that Consumers Power thus breached its contract by terminating him. The great bulk of Walker's testimony and other proof went to the quality of his job performance and the nature of his relationships with other personnel with whom he worked or to whom he was responsible. Plainly most of this evidence was advanced in support of the second part of Walker's contract claim that he was unjustly treated not only because of his race but, even more importantly, because of management's failure to recognize and reward adequately his managerial and engineering talents. In describing plaintiff's position to the jury in the course of his closing instructions, the trial judge stated:

> Plaintiff claims that when he took the position with defendant, he was assured that he would be fired only for just cause, and that he would receive promotions and salary increases commensurate with his performance. Plaintiff claims that he entered into a contract of employment with defendant, and that defendant's failure to promote him and provide him with salary increases, and defendant's termination of his employment, constituted breaches of that employment contract.

It is clear that the trial court submitted to the jury as a matter of Michigan law Walker's claim that he was entitled to a favorable verdict if it found that a two-pronged contract had been established. The court therefore permitted recovery and damages to be based upon losses from both alleged breaches.

So far as we are aware, Michigan law has not as yet firmly extended the principles of *Toussaint* to include implied promises to promote or grant salary increases. *See Dzierwa v. Michigan Oil Co.*, 152 Mich. App. 281, 393 N.W.2d 610 (1986). Upon a theory that at least part of the claim based on such promises to promote was in all events barred by the applicable Michigan statute of limitations, the trial judge does appear to have cautioned the jury that it could not consider defendant's actions prior to August 12, 1974, which

would have limited the plaintiff to recovery for breaches occurring within six years of his having commenced suit. Although Michigan courts have discussed the possibility of a breach of contract claim for failure to grant a promisee a particular position or salary, *Sepanske v. Bendix Corp.*, 147 Mich. App. 819, 384 N.W.2d 54 (1985) *appeal granted sub nom. Teper v. Park West Galleries, Inc.* (March 24, 1987); *Bullock v. Automobile Club of Michigan*, 146 Mich. App. 711, 381 N.W.2d 793 (1985), *appeal pending*, we do not decide whether under proper facts such a cause of action may or may not exist.

After a careful review of the entire record, which included a thorough reading of the transcript, we conclude that while plaintiff made out a sufficient case for submission to the jury upon his claim that Consumers Power breached the employment contract by discharging him without just cause, he presented insufficient evidence concerning a breach of contract for failure to promote. Because objections were carefully preserved, and because we are unable to say that the jury verdict on the *Toussaint* claim was unaffected by the improper instruction concerning failure to promote, we vacate the judgment of the district court and remand for a new trial on the narrow question of unlawful discharge.[1]

Mr. Walker represented himself at the trial, his retained counsel having withdrawn. While he represented himself most ably, this circumstance posed difficulty not only for Walker but also for the trial court and for us. The great bulk of trial testimony consisted of Walker's own statements given in extreme detail. The difficulty confronting the trial court

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[1]While the claims remaining to be retried are pendent, we do not believe under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), that the district court is obliged to dismiss since it is evident that a good-faith case under § 1981 was presented for the jury's consideration and thus was adequate to confer federal question subject matter jurisdiction. The Court's continuing jurisdiction under these circumstances to retry the pendent claim cannot, we believe, be seriously challenged.

and us was in distinguishing between the statements made by Mr. Walker to the court and jury in his capacity as his own advocate and those statements made under oath in his capacity as a witness. Thus, in evaluating the claim of Consumers Power that Walker failed to make out a sufficient case as a matter of law for submission to the jury, it has been necessary not only to view the evidence in the light most favorable to him as the prevailing party, but also to consider only the evidence that was under oath and thus properly before the jury. We must therefore separate for evaluation the statements given under oath from the unsworn additional assertions made by Walker in his opening and closing statements and interjected freely during the course of trial.

We conclude that the uncontradicted testimony of Walker himself concerning statements made by Consumers Power employees shows that such statements would be insufficient as a matter of law to give rise to an enforceable promise for a specific position or salary. Disregarding whether Walker's statements concerning such promises were under oath, none of the statements would reasonably have led Walker to believe that he was entitled to a specific position or salary. The statements offered by Walker in support of his claim simply constituted general assurances that he would receive rewards commensurate with his contributions. Such statements indicate no more than what any employee may hope for if that employee remains with a company.[2] See

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[2]Walker's testimony regarding promises of promotion and salary showed that he expected "to be receiving titles and pay and formal remunerations, and whatever rewards commensurate with my contributions .... [Atwater] said we can't say exactly, but I know various opportunities will come and without question I am going to hold you accountable to your contributions." Testimony of Walker at p. 62, May 8, 1984. Walker testified on May 14, 1984, to similar assurances. However, in response to a direct question from the defense, Walker admitted that there was nothing specifically said about promotions, contributions, or advancements. Cross-examination of Walker at pp. 29-30, May 29, 1984.

Vandendries v. General Motors Corp.,130 Mich. App. 195, 343 N.W.2d 4 (1983), in which the Michigan Court of Appeals refused to recognize an employee's claim for a particular salary commensurate with added responsibilities; it found such a claim too speculative to be submitted to a jury. Walker also introduced evidence about company policy, but the policy only covered promotion procedures and not whether a person could expect promotion. Testimony of Walker at pp. 199-200, 229, May 11, 1984. Such procedures are an inadequate basis for a breach of contract claim. *Dabrowski v. Warner-Lambert Co.*, 815 F.2d 1076 (6th Cir. 1987).

In addition to the lack of evidence to support an enforceable promise of promotion or salary, we think that the uncontradicted evidence shows that by August 12, 1974, Walker himself clearly understood that Consumers Power did not intend to honor any such promises, even assuming they had been made. Defense counsel went to great lengths to show that in 1973 Walker should have been aware that he no longer had any right to expect promotions even if such a right had previously existed:

> Q: And didn't you have discussion at that point with regard to promotions for you?
>
> A: That's correct.
>
> Q: And as a matter of fact, did Mr. Atwater indicate to you he couldn't say anything to you about what the future would hold with regard to promotions for 1973?
>
> A: That's correct.
>
> Q: Mr. Mosley tell you the same thing?
>
> A: That's correct—well, more or less the same thing, yes.
>
> * * *

> Q: But do you recall him telling you that there was no guarantee for promotions for you at that point?
>
> A: That's correct.

Cross-examination of Walker at pp. 94-95, May 29, 1984. Further testimony on this point showed that Walker did not expect promotions even in view of the assurances given him when he accepted employment:

> Q: As a matter of fact, in this meeting with Mr. Atwater in which you were talking about the Gulf Atomic offer, didn't you indicate to him that your interpretation of the corporate policy at that time was a promotion or salary increase was not automatic from a good job evaluation?
>
> A: That's correct.

Recross-examination of Walker at p. 103, May 29, 1984. Therefore, any breach of a promise to promote occurred prior to 1974 and Walker had no legitimate expectation of promotion by that time.

Accordingly, we conclude that it was error for the trial court to have submitted to the jury the issue of failure to promote and grant certain compensation, and to have permitted an award and computation of damages based upon the breach of any such promise. Further, because the actual award of damages could only have been justified, if at all, by including therein the loss of salary increases and promotion, we cannot find that the admission of such evidence was harmless or that it did not affect either the determination of liability or the amount of damages.

II.

Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980), has generated a substantial amount of litigation both in Michigan courts and in the federal courts. *Toussaint* held that an employment contract

provision prohibiting discharge except for cause is legally enforceable even though the contract is not for a definite term. Such a provision may become part of the contract either by express agreement, oral or written, or as a result of the employee's legitimate expectations grounded in the employer's policy statements. *Id.*, 292 N.W.2d at 885.

In this case any expectation on Walker's part that he would remain employed did not arise from an employee manual or general policy statements. Walker solely based his expectation of continued employment and termination only for just cause on a conversation with two Consumers Power employees, Donald Heiks and Robert Atwater. He also asserted that his termination was not for cause because the box marked "for cause" on his termination form had been left blank.

In *Toussaint* and its companion case the employees inquired about job security when they were hired, and were told that each would remain with the company "as long as [he] did [his] job" or that "if he was doing the job, he would not be discharged." *Id.* at 884. Walker testified in this case that he inquired about job security and was given similar assurances that he would not be fired. He said,"I stated at the beginning of my testimony, . . . I stated that I had assurances . . . that I would, that as long as I performed adequately, as long as I did a good performance on my job, that I would not be fired." Walker's direct testimony at p. 73, May 14, 1984. Regarding this kind of a claim, the *Toussaint* court stated:

> When a prospective employee inquires about job security and the employer agrees that the employee shall be employed as long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will without assigning cause and may discharge only for cause (good or just cause). The result is that the employee, if discharged without good or just cause, may maintain an action for wrongful discharge.

Id. at 890. Walker also testified that either Heiks or Atwater had said that "as the department started to grow and as they were to grow that I would be growing along with them, that as long as I did a good job, as long as I handled things all that well, as long as I handled or as long as he thought he perceived my ability to be, I had an outstanding future in the department with them." Walker's testimony on cross-examination at p. 32, May 29, 1984.

As pointed out above, Walker's self-representation caused us a great deal of difficulty in reviewing the sufficiency of evidence supporting his *Toussaint* claim. Although many of Walker's statements concerning the conversation with Heiks and Atwater are best characterized as argument rather than testimony and must be disregarded unless supported by testimony under oath, we find that there was sufficient testimony under oath to warrant submitting the termination issue to the jury. For example, on May 14, 1984 in his direct testimony, Walker talked about his conversation with Heiks and Atwater by referring to earlier remarks made in his opening statement to the jury. It is true that the reference to previous statements could cause the subsequent remarks to be characterized as argument rather than testimony, but that construction seems unduly formalistic since Walker did specifically relate the content of his conversation with Heiks and Atwater.

Our conclusion that Walker presented sufficient evidence to warrant submission to the jury of the issue of just cause termination is strengthened by defendant's lack of serious effort to contradict Walker's testimony. Not only did Walker clearly relate the conversation upon which he based his claim, but also Consumers Power did not even question Donald Heiks about that conversation although Heiks appeared as a witness. The third participant, Robert Atwater, testified that although he remembered meeting Walker at various social events, he did not remember any specific conversations. Further, Consumers Power offered no evidence that

it in any way tried to negate an expectation of continued employment.

The broad construction given *Toussaint* by the Michigan courts also buttresses our conclusion that Walker provided sufficient evidence to go to the jury. In *Valentine v. General American Credit, Inc.*, 420 Mich. 256, 258-59, 362 N.W.2d 628, 629 (1984), the Michigan Supreme Court reiterated that *Toussaint* found enforceable an employment contract providing for termination only upon just cause. The court then held that the employee could not recover mental distress damages for breach of the employment contract. The Michigan Court of Appeals has similarly construed *Toussaint* broadly by allowing *Toussaint* claims to go to a jury where the employee testified that he was promised that he "would never have to worry" as long as he did his job. *Cowdrey v. A.T. Transport*, 141 Mich. App. 617, 619, 367 N.W.2d 433, 434 (1985), that he "would have a lifetime job as long as he did not steal," *Bullock v. Automobile Club of Michigan*, 146 Mich. App. 711, 715, 381 N.W. 2d 793, 794 (1985), *appeal pending*, and that she would "[have] a job a long as [she] did a good job," *Hetes v. Schefman & Miller Law Office*, 152 Mich. App. 117, 119, 393 N.W.2d 577, 578 (1986). That court denies a *Toussaint* claim if the employer expressly indicates that there is no guarantee of future employment or that the employment is terminable at will. *E.g.*, *Ford v. Blue Cross & Blue Shield of Michigan*, 150 Mich. App. 462, 465, 389 N.W.2d 114, 115 (1986); *Riethmiller, M.D. v. Blue Cross & Blue Shield of Michigan*, 151 Mich. App. 188, 198, 390 N.W.2d 227, 232 (1986); *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 587, 349 N.W.2d 529, 531 (1984). Consumers Power in this case offered no evidence through an employee handbook or otherwise that they informed employees generally or Walker in particular that employment was at will.

The federal court decisions construing *Toussaint* necessarily support the general proposition under Michigan law that questions regarding the existence of an implied con-

tract provision requiring discharge only for cause should be submitted to the jury. In *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378, 386 (6th Cir. 1983), this court concluded that the issue of whether the employee was discharged for cause should have been submitted to a jury, and that the district court had correctly denied the employer's motion for judgment notwithstanding the verdict. The employee's claim therein was based on language in an employee manual, the concession of the bank president that it was the bank's practice to dismiss only for cause, and the employee's understanding that termination was only for cause. We have similarly denied employees' claims when no representations were made from which employees could have a reasonable expectation that they would be terminated only for cause, *Kay v. United Technologies Corp.*, 757 F.2d 100 (6th Cir. 1985); *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984), or when the employer expressly stated that employment was terminable at will, *Dell v. Montgomery Ward & Co., Inc.*, 811 F.2d 970 (6th Cir. 1987); *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986). Neither of those situations is presented here.

Therefore, we conclude that the trial court correctly submitted to the jury Walker's breach of contract claim concerning continued employment absent termination for just cause.

III.

Given our disposition of Walker's breach of contract claim under *Toussaint* and the fact that we do not disturb the jury verdict of no cause on Walker's section 1981 claim, the jury instructions on remand will be greatly simplified.

In reviewing the jury instructions given, we conclude that no particular instruction constituted error. Although there may have been some confusion between the elements of a successful 1981 claim and the breach of contract claim, that confusion will be avoided since we remand only on the breach of contract claim under *Toussaint*.

PUBLISHER'S NOTE

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required to instruct a jury on reducing future damages to present value as of the date of filing the complaint, *Currie v. Fiting*, 375 Mich. 440, 453-54, 134 N.W.2d 611, 616 (1965); *Michigan Standard Jury Instructions 2d* § 53.03, or must itself reduce the award to present value, *Freeman v. Lanning Corp.*, 61 Mich. App. 527, 233 N.W.2d 68 (1975). *See also Rodgers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102 (6th Cir. 1984); *Clissold v. St. Louis-San Francisco Railway Co.*, 600 F.2d 35, 40 (6th Cir. 1979). We raise this issue solely for the attention of the trial judge on remand, and do not imply that the judge erred in not giving such an instruction since counsel for Consumers Power neither requested it nor objected to its absence. *Grewe v. Mount Clemens General Hospital*, 404 Mich. 240, 259, 273 N.W.2d 429, 437 (1978).

IV.

For the reasons stated above, we REVERSE and REMAND for a new trial, limited to the issue whether Consumers Power breached an employment contract with Walter Walker by discharging him without just cause.

APPENDIX B

The original judgment. The amended judgment, the Judgment Notwithstanding the Verdict order, and the order denying the Request by the Appellee for a Rehearing En Banc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WALTER A. WALKER, JR.,

Plaintiff,

vs. Docket No. 80-60037
Judge Joiner

CONSUMERS POWER COMPANY,
a Michigan Corporation,

Defendant.

JUDGMENT IN A CIVIL CASE

That judgment be and the same is hereby entered in favor of Plaintiff, Walter A. Walker, Jr., and against defendant, Consumers Power Company, awarding Plaintiff, Walter A. Walker, Jr., compensatory damages in the amount of One million one hundred ninety-four thousand six hundred dollars, ($1,194,600.00) with costs and interest as provided by law.

Charles W. Joiner, U.S. District
Court Judge

Dated JUN 14, 1984
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WALTER A. WALKER, JR.,

Plaintiff,

vs. File No. 80-60037
Judge Charles Joiner

CONSUMERS POWER COMPANY,
a Michigan Corporation,

Defendant.

AMENDED JUDGMENT

At a session of said Court held in the city of Ann Arbor, in the county of Washtenaw, on this ____day of _____, 1984.

PRESENT: HONORABLE CHARLES W. JOINER,
U.S. DISTRICT COURT JUDGE

This matter having come before the Court and a jury with the judicial officer above named presiding, the issues having been tried and the jury having rendered its verdict, a Judgment having been entered on June 14, 1984, a Motion

to Alter or Amend Judgment having been filed by Defendant and having been heard by the Court, this Court having granted said Motion on August 17, 1984, and having instructed Defendant to prepare an Amended Judgement on August 17, 1984, now therefore

IT IS HEREBY ORDERED AND ADJUDGED that a judgment be and the same hereby is entered in favor of Plaintiff, Walter A. Walker, Jr., and against, Consumers Power Company, a Michigan Corporation, awarding Plaintiff, Walter A. Walker, Jr., compensatory damages in the amount of One million one hundred ninety-four thousand six hundred dollars, ($1,194,600.00) with interest from the date of the Judgment at 12.08% and costs as provided by law.

_____

Charles W. Joiner, U.S. District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WALTER A. WALKER, JR.,

Plaintiff,

vs. Civil Action No. 80-60037
Charles W. Joiner

CONSUMERS POWER COMPANY,
a Michigan Corporation,

Defendant.

ORDER

At a session of said Court held in the city of Ann Arbor, in the county of Washtenaw, on the 7th day of August 1984.

PRESENT: HONORABLE CHARLES W. JOINER,
U.S. DISTRICT COURT JUDGE

Defendant having brought on its Motion For Judgment Notwithstanding The Verdict Or, In The Alternative, For A New Trial, Or Remittitur, and Motion To Alter Or Amend Judgment for hearing on August 7, 1984, the parties having submitted briefs in support of and in opposition to

said Motions, the Court having heard the oral argument of the parties on said date, and the court having reviewed the records and files herein and being fully advised in the premises, now therefore

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Judgment Notwithstanding The Verdict Or, In The Alternative, For A New Trial, Or Remittitur shall be and hereby is denied.

IT IS FURTHER ORDERED AND ADJUDGED that defendant's Motion to Alter or Amend Judgment is granted. Pre-judgment interest is abated during the period August 23, 1982 through June 14, 1984.

SO ORDERED.

_____
CHARLES W. JOINER
UNITED STATES DISTRICT COURT JUDGE

Dated AUG 17, 1984
Ann Arbor, Michigan

No. 84-1653

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
SEP 10 1987
JOHN P. HEHMAN, clerk

WALTER A. WALKER, JR.,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	O R D E R
	)	
CONSUMERS POWER CO.,	)	
	)	
Defendant-Appellant	)	

Before: ENGEL, Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that

the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

Supreme Court, U.S.
FILED
DEC 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-890

In The
Supreme Court of the United States
October Term, 1987

WALTER A. WALKER, JR.,

Petitioner,

vs.

CONSUMERS POWER COMPANY, a Michigan Corporation,

Respondent.

RESPONSE TO A PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL TO THE UNITED STATES SUPREME COURT

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether certiorari should be granted to Petitioner when the decision of the Court of Appeals with regard to Petitioner's claim under state law of alleged breach of employment contract is consistent with the usual course of judicial proceedings, consistent with prior federal and state case law, and consistent with the parties' rights to civil trial by jury and due process.

DESIGNATION OF CORPORATE RELATIONSHIPS

Consumers Power Company, filing this Brief in Opposition to the Petition for Writ of Certiorari as Respondent in this proceeding, states that:

This is its original Designation of Corporate Relationships.

The CMS Energy Corporation is the parent of Consumers Power Company.

Consumers Power Company does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries). CMS Energy Corporation does not have an ownership interest in any subsidiaries (excepting wholly owned subsidiaries).

Consumers Power Company and certain of its subsidiaries are affiliated (as Respondent understands the terminology of Supreme Court Rule 28.1), with the MCV Limited Partnership.

Dated: December 3, 1987.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 824 F.2d 499 (6th Cir. 1987).

COUNTER STATEMENT OF THE CASE

On August 12, 1980, Petitioner Walter A. Walker filed a Complaint against his former employer, Respondent Consumers Power Company, in the Federal District Court for the Eastern District of Michigan. Petitioner began employment with the Respondent in Jackson, Michigan, as an Associate Engineer in the Nuclear-Fuel Supply Department on March 15, 1971. He was discharged from his job as a Senior Engineer in the Nuclear-Fuel Supply Department on March 19, 1980.

On or about July 21, 1981, pursuant to permission given by the District Court, Mr. Walker filed his "First Amended Complaint" which contained five counts.

As a result of a Motion to Dismiss and/or for Summary Judgment filed by Respondent on July 13, 1982, the District Court on September 24, 1982, issued its Order dismissing certain portions of Petitioner's First Amended Complaint. The Order left intact portions of Counts I, II and III of the First Amended Complaint which claimed, respectively, a violation of 42 U.S.C. 1981, a breach of an alleged employment contract and the tort of "fraudulent misrepresentation".

Trial in this matter commenced before Judge Charles Joiner on Monday, May 7, 1984. Trial continued on May

7, 8, 9, 10, 11, 14, 29, 30, 31, June 1, 4, 5, and 6, 1984. On June 1, 1984, Respondent made a Motion for Directed Verdict as to all three Counts remaining in the First Amended Complaint, including the claim for breach of an alleged employment contract under Michigan law. The District Court granted the Motion for Directed Verdict as to the claim for fraudulent misrepresentation, but denied the Motion with regard to the claim for breach of employment contract and the claim of a 42 U.S.C. 1981 violation. (Court of Appeals Joint Appendix—Vol. 1 (hereinafter "JA1"), p. 198.

On June 4, 1984, at the conclusion of proofs, the Motion for Directed Verdict was renewed as to the two remaining Counts of the First Amended Complaint. The Motion was denied by the Federal District Court (JA1-209).

On June 5, 1984, Respondent made additional motions to the District Court with regard to the context in which the case was to be presented to the jury. On the same day the jury was instructed. Objections were made by the Respondent to most of the Court's instructions to the jury on the claim for breach of employment contract (JA1-230, et. seq.). Petitioner made no objections to the jury instructions (JA1-260).

Consequently, the case was submitted to the jury on the first two counts of the First Amended Complaint, i.e., alleged violation of Plaintiff's civil rights under 42 U.S.C. 1981, and alleged breach of employment contract under Michigan law.

On June 6, 1984, the jury returned with its verdict. The jury found that the Defendant did not deny the Plain-

tiff certain employment benefits claimed by him or terminate Plaintiff's employment as a proximate result of racially discriminatory motives. The jury then did find that the "Defendant breached an employment contract with the Plaintiff in not giving him certain employment benefits claimed by him or in terminating his employment all as explained in these instructions". The jury awarded compensatory damages in the amount of $1,194,600. (JA1-268).

Subsequent thereto, Respondent's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial or Remittitur was heard and denied by the District Court on August 7, 1984. An Order to that effect was entered on August 17, 1984 and an Amended Judgment was thereafter entered by the Court on September 4, 1984 in favor of Petitioner.

On September 6, 1984, the Respondent filed with the United States Court of Appeals for the Sixth Circuit its Notice of Appeal from the verdict of the jury, from the Amended Judgment entered on September 4, 1984, and from the Order denying Respondent's Motion for Judgment NOV or in the Alternative, for a New Trial or Remittitur.

The Petitioner did not appeal the Judgment of the trial court.

The case was subsequently briefed and submitted to the Court of Appeals by the parties in accord with the Federal Rules of Appellate Procedure. The case was orally argued before the Court of Appeals on March 7, 1986. A decision was rendered by the Court of Appeals for the

Sixth Circuit on July 27, 1987 (*See Walker v. Consumers Power Co.*, 824 F.2d 499 (6th Cir. 1987)).

The primary holding of the Sixth Circuit Court of Appeals was as follows:

> . . . Accordingly, we conclude that it was error for the trial court to have submitted to the jury the issue of failure to promote and grant certain compensation, and to have permitted an award and computation of damages based upon the breach of any such promise. Further, because the actual award of damages could only have been justified, if at all, by including therein the loss of salary increases and promotion, we cannot find that the admission of such evidence was harmless or that it did not affect either the determination of liability or the amount of damages. 824 F.2d 499, 502.

Consequently, the Court of Appeals remanded Petitioner's case for a new trial limited to the issue under Michigan law of whether Respondent Consumers Power breached an employment contract with Petitioner by discharging him without just cause (*See* 824 F.2d 505).

On or about August 6, 1987, Petitioner filed with the Sixth Circuit Court of Appeals his "Suggestions for Rehearing En Banc". On September 10, 1987, the Sixth Circuit entered its Order denying the Petition for Rehearing En Banc after circulation to all active judges on the court.

Petitioner subsequently apparently filed his Petition for a Writ of Certiorari in this Court on or about November 9, 1987. The Petitioner apparently alleges that the decision of the Sixth Circuit Court of Appeals in this matter constituted, under Supreme Court Rule 17(a), a departure

" . . . from the accepted and usual course of judicial proceedings," or a sanctioning of such a "departure" by a lower court.

———o———

ARGUMENT

Petitioner apparently alleges that the facts of this case constitute "special and important reasons" to grant the writ within the meaning of United States Supreme Court Rule 17. There are at least three reasons why the instant case does not present "special and important reasons" requiring a grant of a Petition for Writ of Certiorari.

First, the decision of the Court of Appeals is in accord with prior state and federal case law pertinent to the issues presented upon appeal by Respondent to the Sixth Circuit.

It was the Respondent's position upon appeal that the Federal District Court had improperly allowed Plaintiff to submit to the jury a breach of job contract claim based upon an alleged promise of "future titles and pay". It was Respondent's position that submission of such a question to the jury was improper under the Michigan case of *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich 578, 292 N.W.2d 880 (1980) for the reason that *Toussaint, supra,* and its progeny did not allow such a claim. Respondent further contended upon appeal that Petitioner in the instant case submitted insufficient evidence in support of such a claim.

The Court of Appeals characterized the case presented to the jury as follows:

> . . . In describing plaintiff's position to the jury in the course of his closing instructions, the trial judge stated:
>
> > Plaintiff claims that when he took the position with defendant, he was assured that he would be fired only for just cause, and that he would receive promotions and salary increases commensurate with his performance. Plaintiff claims that he entered into a contract of employment with defendant, and that defendant's failure to promote him and provide him with salary increases, and defendant's termination of his employment, constituted breaches of that employment contract.
>
> It is clear that the trial court submitted to the jury as a matter of Michigan law Walker's claim that he was entitled to a favorable verdict if it found that a two-pronged contract had been established. The Court therefore permitted recovery and damages to be based upon losses from both alleged breaches. 824 F.2d 499, 500-501.

In so describing, the Court of Appeals quoted the language of Instruction No. 37 given by the Trial Judge and objected to by Respondent.

In *Valentine v. General American Credit, Inc*, 420 Mich. 256, 362 N.W.2d 628 (1984), the Michigan Supreme Court, in interpreting *Toussaint, supra*, indicated that:

> . . . The only right held in *Toussaint* to be enforceable was the right that arose out of the promise not to terminate except for cause. 420 Mich. 256, 258.

Subsequently, in the case of *MSEA v. Department of Mental Health*, 421 Mich. 152, 365 N.W.2d 93 (1984), the Michigan Supreme Court indicated that:

> . . . The legal protection of employee interests in job security is the exception, rather than the rule, in this state. 421 Mich. 152, 158.

The decision of the Court of Appeals accurately recognized that there were a number of cases wherein Michigan courts had refrained from creating a cause of action for breach of an implied promise to promote or grant salary increases. *See,* 824 F.2d 499, 501 and cases cited therein, including *Dzierwa v. Michigan Oil Company,* 152 Mich. App. 281, 393 N.W.2d 610 (1986); *Sepanske v. Bendix Corp.*, 147 Mich. App. 819, 384 N.W.2d 54 (1985), appeal granted sub nom. *Teper v. Park West Galaries, Inc.*, 428 Mich 873, 402 N.W.2d 469 (1987); *Bullock v. Automobile Club of Michigan*, 146 Mich. App. 711, 381 N.W.2d 793 (1985), appeal pending.

The Sixth Circuit Court of Appeals therefore found that Petitioner herein, as a matter of law, had failed to submit sufficient evidence in support of a claim for breach of implied promise to promote or grant salary increases. Relying on the cases of *Vandendries v. General Motors Corp.*, 130 Mich. App. 195, 343 N.W.2d 4 (1983), and *Dabrowski v. Warner-Lambert Co.*, 815 F.2d 1076 (6th Cir. 1987), as well as the cases cited above, the Court of Appeals found as follows:

> . . . We conclude that the uncontradictory testimony of Walker himself concerning statements made by Consumers Power employees shows that such statements would be insufficient as a matter of law to give rise to an enforceable promise for a specific position or salary . . . The statements offered by Walker in support of his claim simply constituted general assurances that he would receive rewards commensurate with his contributions. Such statements indicate no more than what any employee may hope for if that employee remains with the company . . . 824 F.2d 499, 501-502.

Having reached such conclusion, the Court of Appeals was required to reverse and remand the matter for a new trial. Federal case law strongly suggests that the prejudicial and improper admission of evidence is a ground for a new trial (*See* for instance, *White v. Cohen,* 635 F.2d 761 (9th Cir. 1981); *Juneau Square Corp v. First Wisconsin National Bank of Milwaukee,* 624 F.2d 798 (7th Cir. 1980) cert. den., 449 U.S. 1013, 66 L. Ed. 2d 472, 101 Sup. Ct. 571 (1980)). As a result, the Court of Appeals in this case quite properly granted Respondent a new trial on the narrow issue of whether or not Petitioner was wrongfully terminated from his employment at Consumers Power without just cause under Michigan law.

The second reason why the writ should not be granted is because, contrary to Petitioner's apparent assertions at page 30 of his submission to this Court, there was no "cover-up" by either the Court of Appeals or the Federal District Court.

Petitioner apparently asserts that the Federal District Court, which upheld his jury award of almost 1.2 million dollars, as well as the Court of Appeals, which remanded the matter for new trial, have somehow "covered-up" the true circumstances of this case as a result of "malice".

Such assertion is simply not true. The trial court gave Petitioner ample opportunity to express his views both through written and oral arguments before and during trial. The trial court gave Petitioner ample opportunity to present his case through submission of oral and documentary evidence. The record below substantiates those

facts no matter how hard Petitioner may try to ignore them.

At the Court of Appeals, Petitioner was given every opportunity to raise both orally and in writing any and all arguments he had in this matter. Petitioner took full advantage of such opportunity, even though he failed to appeal the trial court verdict.

Petitioner then apparently suggests that the Court of Appeals failed to adequately review the record below. He does so by advancing in his Petition a number of seemingly irrelevant arguments which are not responsive to the issues raised by Respondent in the trial court and upon appeal. In so doing, Petitioner completely ignores his specific trial testimony relied upon by the Court of Appeals in its decision.

At 824 F.2d 502, the Court of Appeals specifically cites the trial testimony of Petitioner on May 8, 1984, May 11, 1984, May 14, 1984 and May 29, 1984 in resolving the issues raised by Respondent on appeal with regard to the claim for breach of contract based on "future promotions". Nowhere in the Petition before this Court is there a rebuttal of the specific trial testimony by Petitioner which established the inadequacy of his claim for future promotions and pay. As a result, Petitioner's apparent claim that some relevant "facts" were ignored by the Court of Appeals as a result of "malice" is simply not borne out by either the record below or the Petition before this Court.[1]

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[1] The allegations of page 63 of the "Petition" are also not supported in the record. The Court of Appeals, in its order filed April 17, 1985, found that the trial transcript had been

(Continued on next page)

The third reason why the Petition should not be granted is because the ruling of the Court of Appeals is consistent with the parties' rights to civil trial by jury and due process.

Petitioner apparently asserts that his rights to trial by jury and due process were abrogated as a result of the Court of Appeals' opinion in this matter. A review of the Petition and the Court of Appeals decision fails to substantiate this assertion, which is made for the first time before this Court.

To the contrary, the Court of Appeals' decision confirmed Petitioner's right to trial by jury. It confirmed his right to proceed to a new trial on the issue of Michigan law involved with his claim of breach of his employment contract.

Similarly, Petitioner's claims of a violation of his due process rights do not survive scrutiny. Such claims are apparently primarily based on Petitioner's assertion that District Judge Joiner should never have given instruction number 37 to the jury. (See Petition, page 31, 35, 36-63). It is instruction number 37 which the Court of Appeals

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(Continued from previous page)

properly requested under the applicable rules and that the escrow agreement established and supervised by the District Court after motion and oral argument was in compliance with the applicable rules. As to the accuracy of the transcript of the post-verdict Judgment NOV hearing of August 7, 1984, the Court of Appeals order of July 18, 1985, did not "accept" a "falsified" transcript, but rather invited the Petitioner to pursue the matter of the transcript's accuracy with the District Court under FRAP 10(e). Petitioner failed to pursue the matter.

cites as demonstrating that the jury was improperly allowed to consider the "future promotions and pay" issue under state law. (824 F.2d 500). Petitioner herein apparently agrees that the instruction was improper, but apparently alleges the Court of Appeals had no right to remand once it decided the same thing.

The giving of an erroneous instruction or failure to give a properly requested instruction is grounds for a new trial, provided the party moving for a new trial made an objection before the jury retired to consider its verdict and stated distinctly the grounds upon which it objected (*See,* for instance, *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 92 L. Ed. 242, 68 S. Ct. 296 (1948); *Bentley v. Stromberg-Carlson Corp.*, 638 F.2d 9 (2nd Cir., 1981); 6A Moore, et. al., *Moore's Federal Practice,* ¶ 59.08[2]).

What Petitioner ignores is the fact that he never objected to any instruction at trial nor made any attempt on the record to cure it. (See JA1-260). Rather, it was Respondent which objected and preserved the issue for appeal. As a result, Petitioner cannot now claim violation of any alleged due process rights as a result of the giving of erroneous instructions.

In alleging a denial of his right to trial by jury and due process, Petitioner further ignores the fact that he never perfected an appeal to the Court of Appeals on any issue raised or result reached in the trial court. (*See* Federal Rules of Civil Procedure 50(b), 59; Federal Rules of Appellate Procedure 3, 4, 27(a); 28 U.S.C. § 1291; 9 Moore, et. al., *Moore's Federal Practice,* ¶ 204.02, 204.11). Despite this fact, the Court of Appeals examined the totality of the case and found no other error:

> . . . Prior to the trial court granting defendant's motion for a directed verdict on the claim for fraudulent misrepresentation, and at the close of trial the jury returned a verdict in favor of Consumers Power on the 1981 claim. No cross-appeal has been taken nor does this appeal reveal any errors in the rulings with respect to Counts 1 or 3, which would require us to disturb those results . . . 824 F.2d 499, 500.

Petitioner obviously disagrees with the result reached by the Court of Appeals. Yet the Court of Appeals decision amply demonstrates that the Petitioner did exercise his right to trial by jury and that such right has been preserved for him. The decision further demonstrates that the Petitioner's right to due process was fulfilled by, among other procedures, the Court of Appeals' own review process.

The Petition cites no case law and no actual facts in support of its new claims of denial of right to jury trial and due process. The Petition ignores facts which rebut such claims. As a result, the Petition should be denied.

———o———

CONCLUSION

Examination of the record and the decision below indicates that the decision of the United States Court of Appeals for the Sixth Circuit is consistent with prior state and federal case law concerning Petitioner's claim of wrongful termination under Michigan law. The record further reveals that the procedure followed by the Federal District Court and the Sixth Circuit Court of Appeals in this matter was consistent with the usual course of judi-

cial proceedings and consistent with the parties' rights to civil trial by jury and due process. The Petitioner having raised no special and important reasons for the granting of the Writ, the Writ should therefore be denied.

Respectfully submitted,

FOSTER, SWIFT, COLLINS & COEY, P.C.
Attorneys for Respondent
Consumers Power Co.

/s/ By GEORGE M. BROOKOVER
George M. Brookover (P25391)

DATED: December 3, 1987.